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No. ~~23,318~~ A, B

United States Court of Appeals

For the Ninth Circuit

WILLIS K. BAKER, JR., and
MERVIN "BUD" CORNELSEN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR A REHEARING

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APPELLANTS' PETITION FOR A REHEARING

To the above-entitled court, as constituted in the original hearing:

Both appellants respectfully petition for rehearing, upon the following grounds:

I. THE DECISION FAILED TO RULE ON THE SPECIFIED ERROR OF MISCHARGING THE JURY: "THERE IS NOTHING DIFFERENT IN THE WAY A JURY IS TO CONSIDER THE PROOF IN A CRIMINAL CASE FROM THAT IN WHICH ALL REASONABLE PERSONS TREAT ANY QUESTION DEPENDING UPON EVIDENCE PRESENTED TO THEM."[1]

No more prejudicial or sedating misinstruction could have been given this jury, especially at the end of these lengthy and complicated instructions. (RT 1286.) Of course the usual reasonable doubt instructions were dutifully given early in the business. (RT

[1]Page 22, Appellants' Opening Brief (hereinafter called AOB); and subdivision (c) of that point of error, at 24-25 AOB.

1263-1264.) But then came 22 more pages of complicated instructions. At the precise point where the normal juror was saying to himself, "This is all very well and very complicated, and you say I have to sort it out and determine if defendants are guilty; but how in the world am I to do it?"—then, came the misinstruction: Just go out and decide this case in the same way you would treat "any question depending upon evidence," said the court to the jury; and the jury did.

Such instruction was clearly erroneous and prejudicial. It washed out the practical application of reasonable doubt in this extremely close case. It deprived defendants of the fair trial guaranteed them by the due process clause of the Fifth Amendment, United States Constitution.

The important point was not ruled upon or discussed in the decision herein of April 4, 1968.[2]

Cases correctly setting forth the correct standard include:

Norwitt v. U.S., 195 Fed. 2d 127, 134;
Williams v. U.S. (9th Cir.), 271 Fed. 2d 703, 704;
Henderson v. U.S. (9th Cir.), 143 Fed. 2d 681, 682;
Rose v. U.S., 149 Fed. 2d 755, 759;
U. S. v. Belisle, 107 Fed. Supp. 283, 285.

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[2]It is interesting to note that the instruction complained of here is not tolerated in the chapter, "Evidence Evaluation", *Jury Instructions in Federal Cases* (Seventh Circuit Judicial Conference Committee on Jury Instructions, Judge Walter J. LaBuy, Chairman), hereinafter cited as "LaBuy".

II. THIS ANTI-REASONABLE DOUBT INSTRUCTION DEPRIVED APPELLANTS OF THE FAIR TRIAL GUARANTEED THEM BY THE DUE PROCESS CLAUSE, FIFTH AMENDMENT, UNITED STATES CONSTITUTION.

The ground for rehearing on this point is set forth without argument pursuant to the rehearing Rule 23, Rules on Appeal; and by incorporation of Point I hereinabove.

III. THE TRIAL COURT CLEARLY ERRED IN TWICE INSTRUCTING THAT IT WAS NOT NECESSARY THAT THE GOVERNMENT PROVE THAT THE DEFENDANTS KNEW THAT THE STOLEN PROPERTY BELONGED TO THE UNITED STATES; AND THEREFORE THE TRIAL COURT SHOULD HAVE GRANTED MOTIONS FOR ACQUITTAL AND NEW TRIAL AS URGED IN THE FOURTH, FIFTH AND SIXTH SPECIFICATIONS OF ERROR.

After giving this erroneous instruction, the trial judge unduly emphasized it by repeating it. (RT 1283.) And the prosecutor told the jury:

> "I believe the judge will instruct you that it isn't even necessary that they know it's stolen Government property; all they have to know is that this property is stolen. All they have to know is that Mr. Stephenson does not have the property rightfully; where he got it or how he got it isn't important. . . ." (RT 1154.)

The Seventh Circuit gives diametrically opposed instructions on this issue:

> "Section 19.01 *Offense of Stealing Government Property*
>
> Defendant has been indicted for the crime of stealing property of the United States. To convict defendant of this crime the Government must

prove beyond a reasonable doubt that defendant unlawfully took without authority property owned by the United States, with knowledge that the property belonged to the United States, and with the specific intent to deprive the Government of its use.

Section 19.02 *Offense of Unauthorized Sale of Government Property*

Defendant has been indicted for the crime of selling property of the United States without authority. To convict defendant of this crime the Government must prove beyond a reasonable doubt that defendant sold or disposed of property of the United States without authority to do so, and with knowledge that the property was owned by and was stolen from the United States.

Section 19.03 *Offense of Receiving Stolen Government Property*

Defendant has been indicted for the crime of receiving, concealing or retaining property stolen from the United States. To convict defendant of this crime the Government must prove beyond a reasonable doubt that defendant received, concealed, or retained property owned by the United States with the intent to convert such property to his own use, and with knowledge that it has been stolen from the United States."

LaBuy.

The essential cases here confirming the Seventh Circuit rule are:

Souza v. U.S., 304 Fed. 2d 274, 277 (9th Cir.);
Schaffer v. U.S., 221 Fed. 2d 17 (5th Cir.);
Mora v. U.S., 190 Fed. 2d 749, 751 (5th Cir.).

IV. APPELLANTS REQUEST REHEARING FOR BETTER ELUCIDATION OF ALL THE SPECIFICATIONS OF ERROR RAISED IN THEIR OPENING BRIEF.

All the specifications of error take on more significant hue, in the context of the misinstructions above-mentioned.

SUMMARY

For the above reasons, and for the reason that none of the above points were effectively or at all ruled upon in the April 4, 1968 decision, appellants respectfully pray that a rehearing be granted, under Rule 23, Rules on Appeal.

Dated, San Francisco, California,
May 1, 1968.

GEORGE T. DAVIS,
Attorney for Appellants and Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that I have read the foregoing Petition for Rehearing and that said Petition in my judgment is well founded and not interposed for the purpose of delay.

GEORGE T. DAVIS,
Attorney for Appellants and Petitioners.